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No. 91

In the Supreme Court of the United States

OCTOBER TERM, 1953

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 91

FOLEY BROS., INC. AND SPENCER, WHITE & PRENTIS, INC., PETITIONERS

v.

FRANK PAUL FILARDO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

BRIEF FOR PETITIONERS [1]

OPINIONS BELOW

The oral rulings of the Supreme Court of New York, New York County (R. 81, 84), are not reported. The opinion of the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department (R. 129–131) is

[1] The Solicitor General is appearing on behalf of petitioners because, in accordance with the provisions of its contract with petitioners here involved, a wartime "cost-plus" contract, the Department of the Army will ultimately have to pay such judgments as may be here rendered against petitioners.

reported at 272 App. Div. 446. The opinion of the Court of Appeals of New York (R. 132–138) is reported at 297 N. Y. 217.

JURISDICTION

The judgment of the Court of Appeals of New York was entered on March 12, 1948 (R. 138–139). The jurisdiction of this Court was invoked under Section 237 (b) of the Judicial Code, now 28 U. S. C. 1257 (3). The petition for certiorari was filed on June 11, 1948, and granted on October 11, 1948.

QUESTIONS PRESENTED

1. Whether the Eight Hour Law is applicable in the performance of a contract between the United States and a private contractor for construction work in a foreign country.

2. Whether, assuming the applicability of the Eight Hour Law, employees of the Government's contractor have recourse to the courts to recover overtime compensation either (a) by reason of a cause of action arising under the statute or (b) as third party beneficiaries of a contractual provision requiring the contractor to comply with the laws of the United States.

STATUTES INVOLVED

The pertinent provisions of the Eight Hour Law (Act of August 1, 1892, 27 Stat. 340, as amended, 40 U. S. C. 321–326), are set out in Appendix A, *infra*, pp. 49–54.

STATEMENT

The undisputed facts follow:

On November 10, 1941, petitioners entered into a cost-plus contract with the United States whereby petitioners were to construct roads, buildings and bases in the Middle East (R. 4, 98). In the contract, petitioners agreed *inter alia* to "obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, all political subdivisions thereof, or any other duly constituted public authority wherein the work is done" (R. 98). In February, 1942, by a contract made in New York (R. 94), petitioners hired respondent, an American citizen, to work as a cook on these construction projects at the salary of $60 per week (R. 14, 87, 88). Respondent's contract of employment with petitioners required him to "devote all of his time and attention and give his best efforts and skill to the performance of such services in and about such projects as the Constructors may from time to time assign to him" (R. 89). The employment contract contained no other provision as to hours and no provision for overtime pay, but respondent's weekly salary was set pursuant to a formula which set his wages at 150% of 85% of the New York prevailing wage rates (R. 60).

Pursuant to his contract, respondent went to petitioners' projects in Iraq and Iran (R. 15, 82).

He worked a total of seventy-four weeks during 1942 and 1943, including the time of his transportation, for all of which he received an average weekly salary of $68.38 (R. 82).[2] During that time he frequently worked more than eight hours a day and requested that he be paid for the work performed in excess of eight hours a day, but his request was refused (R. 19–23, 94). Upon his return to the United States, respondent again requested payment for the work performed in excess of eight hours a day, which request was again rejected (R. 22, 95–96).

Respondent, thereafter, on July 29, 1943, brought this suit against petitioners in the Supreme Court of the State of New York, County of New York, under the Eight Hour Law to recover compensation for work in excess of eight hours a day allegedly due him thereunder[3] (R. 3, 4–5). Petitioners' answer, filed on January 6, 1944, denied that respondent was entitled to any recovery (R. 5, 6–7). A trial was had before a jury. During the course of the trial, petitioners moved to dismiss the complaint on the ground that the

[2] Respondent from time to time received various voluntary salary increases (R. 24).

[3] The complaint as amended set forth two causes of action. The first, an attempt to set aside the employment contract and recover in *quantum meruit* for the "reasonable value" of respondent's services, was subsequently dismissed on motion of the petitioners (R. 48, 75). Respondent took no appeal to the Appellate Division from this dismissal, and hence that issue is no longer in the case.

Eight Hour Law conferred no right of action on respondent to sue his employer for overtime pay (R. 48–52). The trial court denied the motion, holding that the Eight Hour Law "* * * applies beyond the limits of the United States. The plaintiff has a right to bring this action" (R. 75, 81). At the close of the trial, petitioners joined in respondent's motion for a directed verdict (R. 81). They thereafter requested the court to charge that there is no right of action for overtime conferred on respondent by the Eight Hour Law, and excepted to its refusal so to charge (R. 84). Petitioners also excepted to the court's charge that the Eight Hour Law conferred a right of action upon respondent for overtime pay (R. 84) and moved to set aside the verdict (R. 86). The jury found that respondent had worked for a total of 1172 hours overtime (R. 85), and that on the basis of one and one-half times his average rate of pay per hour, the sum of $2,496.36 was due him (R. 85). The court added interest in the amount of $650 and costs of $181.60, and entered judgment for $3,327.96 (R. 1, 12, 13).

Upon appeal to the Appellate Division, First Department, the judgment of the Supreme Court was reversed (R. 128). The court concluded, two judges dissenting, that neither the Eight Hour Law nor the 1940 amendment thereto conferred a right of action for overtime pay, and in view of this conclusion, did not pass on the other ques-

tions raised (R. 131). Appeal was taken by respondent to the Court of Appeals, which reversed the judgment of the Appellate Division (R. 132–138).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals of New York erred:

1. In holding that the Eight Hour Law is applicable in the performance of a contract between the United States and a private contractor for construction work in a foreign country.

2. In holding that the Eight Hour Law conferred a right upon respondent to sue petitioners for compensation for work in excess of eight hours a day.

3. In holding that respondent could maintain a suit against petitioners for compensation for work in excess of eight hours a day as a third party beneficiary of the contract between petitioners and the United States.

4. In reversing the judgment of the Appellate Division of the Supreme Court of New York.

SUMMARY OF ARGUMENT

I

The Eight Hour Law does not apply extraterritorially. The literal language would include contracts performed outside the United States. But it is well established that legislation is presumed to apply only within the territorial juris-

diction of the United States unless a contrary intent appears. This is particularly true as to criminal laws. The history and purpose of the Eight Hour Law do not rebut this presumption of normal legislative intent, but demonstrate that the Act was not intended to operate outside the United States. The aim of the series of statutes embodied in the Eight Hour Law was to deal with domestic problems. It is also significant that Congress has made it plain that other labor legislation does not apply extraterritorially; there is no reason why the Eight Hour Law should have a broader sweep.

The Eight Hour Law has been construed by the Government contracting agencies as not having extraterritorial application, and this interpretation is entitled to weight. The two opinions of the Attorney General dealing with the subject, read together, seem to leave open the precise question involved here, and cannot be said to support respondent's position.

II

It is the position of the Department of the Army that the Eight Hour Law does not confer a statutory right to sue upon employees not paid overtime.

Prior to the 1940 amendment the Eight Hour Law clearly did not afford any individual worker a right to recover compensation, but merely imposed civil and criminal penalties upon the con-

tractor. Its primary purpose was to benefit employment generally, not the persons who were already employed by the Government or on Government contracts. The 1940 amendment suspending the effect of the statute upon payment of time and a half for overtime did not change the basic purpose of the law so as to grant a right to the individual worker. No such purpose is expressed in the history of the amendment, which is not separate legislation but merely a suspension of the main statute. Where Congress has intended to provide a procedure whereby an employee is to receive compensation, it has experienced no difficulty in expressly doing so in other labor statutes enacted within the period prior to the passage of the 1940 amendment. The omission of any such provision from the amendment to the Eight Hour Law, together with the fact that the Law enumerates other sanctions, is a clear manifestation of legislative intent that no individual right of action was created.

III

The contract between the petitioner and the Government included a provision requiring petitioner to "obey and abide by all applicable laws * * * of the United States." Respondent cannot sue as third party beneficiary under this provision unless it was included in the statute for his direct benefit. This depends upon whether the Eight Hour Law itself was intended for the

benefit of the individual employees. If Congress meant them to have a statutory right, they can of course recover irrespective of their status as third party beneficiary. If the statute gave them no such right, it seems clear that the general requirement that the contractors obey all laws does not create greater rights than the laws themselves.

ARGUMENT

This case presents certain aspects of a widespread recent effort to develop and expand, through litigation in situations where the Fair Labor Standards Act, 29 U. S. C. 201 *et seq.*, is not applicable, employee rights under statutes embodying federal wage-hour policy as to Government construction and procurement.[4]

The statute here involved is the Eight Hour Law (40 U. S. C. 321–326, *infra*, pp. 49–54) which stems from the Congressional declaration of 1868 that eight hours should constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the Government of the United States. By Congressional enactment in 1892 and 1912, the old law was strengthened by providing civil penalties of five dollars a day for its non-enforcement or

[4] The statutes (and executive order) under which this litigation has arisen are the Eight Hour Law (40 U. S. C. 321 *et seq.*), the Bacon-Davis Act (40 U. S. C. 276a *et seq.*), the Walsh-Healey Act (41 U. S. C. 35 *et seq.*), and Executive Order 9240 (7 F. R. 7159, 7419).

violation and by extending its provisions to employees of contractors doing Government work. In addition to the civil sanctions (40 U. S. C. 324), intentional violations are declared misdemeanors, punishable by fine or imprisonment (40 U. S. C. 322).

In September, 1940, with the great need for accelerating production for war purposes, Congress removed the absolute prohibition against contractors employing laborers and mechanics in excess of eight hours a day, and provided (54 Stat. 884, 40 U. S. C. 325a):

> Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay.

This amendment, however, unlike the Fair Labor Standards Act, conferred upon employees no express right to sue for recovery of overtime pay.

In sustaining respondent's claim herein, the court below has held the statute applicable to the performance of a contract between the United States and a private contractor for construction work in a foreign country, and has found an

implied statutory right in employees of the contractor to sue for and obtain money compensation for overtime.

We believe that the court below was in error in holding the statute applicable to transactions occurring outside the United States.

The question as to the right of employees to sue under the Eight Hour Law to recover overtime compensation is one upon which the lower courts are not in accord, and as to which a decision by this Court would clarify and facilitate the administration of government contracts. On this point there are conflicting governmental interests. The Government has an interest in effective law enforcement; allowing the employees to sue for the statutory overtime would add a sanction to the statute and tend to insure employer compliance. On the other hand, since the Government must pay any amounts due employees under cost plus contracts such as we have here, the Government's financial interest is the same as the employer's. It is the position of the Department of the Army, the contracting agency, that the employees have no right to sue.

We believe that this Court will desire the benefit of a complete presentation of the arguments on each side of this question. The contentions in support of the decision below will, of course, be presented by counsel for respondent. The Department of Justice has represented the Army below in this case, and is of the view that the

Army is entitled to have its position fully stated. Point II of this brief, therefore, will set forth the argument on behalf of the Department of the Army on this question.

I

THE EIGHT HOUR LAW DOES NOT APPLY EXTRATERRITORIALLY

A. GENERAL STATUTES ARE PRESUMED NOT TO OPERATE EXTRATERRITORIALLY

We agree with the court below that Congress possesses the power to prescribe hours of work and rates of compensation for work performed pursuant to contracts with the Federal Government whether or not the work is performed within the United States. Cf. *Blackmer* v. *United States,* 284 U. S. 421. The basic inquiry here is whether or not Congress intended to exercise its power extraterritorially, an inquiry not satisfied by the approach taken by the Court of Appeals.

The court below (R. 136) relied primarily on a literal reading of the language of the Eight Hour Law, which in terms applies to "every contract made to which the United States * * * is a party." But this is not decisive when the issue relates to the application of a statute beyond the territorial limits of the enacting sovereign. It is a well-established canon of construction that "all legislation is *prima facie* territorial." *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357;

Sandberg v. *McDonald*, 248 U. S. 185; *Neilson* v. *Rhine Shipping Co.*, 248 U. S. 205. In *Blackmer* v. *United States*, *supra*, at 437, the Court stated that "The legislation of Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States * * *."

This is true even though the statute may contain general words such as "every", which literally would reach extraterritorial acts. In the *American Banana* case the Court said, in reference to the Sherman Act (213 U. S. at 357):

> * * * Words having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch.

See also *State* v. *Lancashire Ins. Co.*, 66 Ark. 466, 476; *Dur-ite Company* v. *Industrial Commission*, 394 Ill. 338, 348.

This presumption that statutes are to be construed as limited to the national territory has especial weight in connection with laws dealing with industry and labor, since on those subjects Congress would ordinarily be concerned only with conditions within this country and its possessions, and not with conditions abroad. Explicit language would be necessary to manifest a contrary legislative design.

The fact that the Eight Hour Law is a criminal statute also is significant in this respect. For obvious reasons criminal laws are not construed as applicable extraterritorially unless a contrary intention plainly appears. In *United States* v. *Flores*, 289 U. S. 137, 155, this Court declared:

> It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect. *United States* v. *Bowman*, 260 U. S. 94, 98; compare *Blackmer* v. *United States*, 284 U. S. 421.

As already noted, *supra*, p. 10, the Eight Hour Law declares intentional violations to be misdemeanors, punishable by fine and/or imprisonment[5] (40 U. S. C. 322). Had Congress intended this criminal statute to have extraterritorial application, it would have been "* * * * natural for Congress to say so in the statute, * * *." *United States* v. *Bowman*, 260 U. S. 94, 98; *United States* v. *Flores*, 289 U. S. 137, 155.

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[5] The court below avoided the presumption against extraterritoriality which attaches to criminal statutes by arbitrarily confining itself to the civil aspects of the Eight Hour Law (R. 136–137). The criminal penalties provided by the Act of August 1, 1892, *supra*, have remained in full force and effect. The 1912 amendment (Act of June 19, 1912, 37 Stat. 137), in adding civil sanctions (40 U. S. C. 324), expressly did not repeal or modify the pre-existing statutory provisions and left the criminal penalties as an integral part of the law. 40 U. S. C. 325; see 39 Op. A. G. 418.

These principles of construction are recognized as aids to statutory interpretation only because they express the normal intention of a legislative body with respect to the territorial scope of its enactments. They are not absolute. The subject of a statute may be such as to manifest an intention that the law be applicable wherever the offense be committed, as in the case of frauds against the United States. Cf. *United States* v. *Bowman*, 260 U. S. 94, which involved a conspiracy hatched on an American vessel on the high seas to defraud the United States Emergency Fleet Corporation. And of course there may be other evidence, in the statute or in its purpose or legislative history, of an intent that the law be applied outside the international boundaries.

But neither the respondent nor the court below has referred to any factor or circumstance which shows that the normal presumption against extra-territorial application should not govern here.[6] On the contrary, as we shall show, consideration of the purpose and history of the Eight Hour Law

[6] The workmen's compensation cases relied upon by the court below (R. 137) are not in point. They involve questions of conflict of laws and full faith and credit, and the statutes concerned specifically provided for application to employees injured outside the state where the contract of employment was made. *Industrial Commission* v. *McCartin*, 330 U. S. 622; *Alaska Packers Association* v. *Industrial Accident Commission of California*, 294 U. S. 532. There is no problem of statutory construction, of course, when the statute is specific.

and its administrative construction will demonstrate clearly that the Act was not intended to operate outside the United States.

B. THE LEGISLATIVE HISTORY OF THE EIGHT HOUR LAW REVEALS AN EXCLUSIVELY DOMESTIC POLICY AND PURPOSE

The Eight Hour Law evolved from a statute, first enacted in 1868, which merely declared "That eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may be hereafter employed, by or on behalf of the government of the United States." Act of June 25, 1868, 15 Stat. 77. The legislative debates indicate that the evil to be corrected was the unemployment resulting from the decrease in ship construction at Government Navy Yards upon termination of the Civil War. It was thought that the statute would spread the available work. 78 Cong. Globe 335.

In 1892 the law was re-enacted (Act of August 1, 1892, 27 Stat. 340) to secure a practical enforcement of the prior act by extending its coverage to contractors (40 U. S. C. 321) and by the addition of criminal penalties (40 U. S. C. 322). It is apparent from the debates and the pertinent House Report that domestic unemployment of one million, and the influx of cheap foreign labor were of grave concern. 23 Cong. Rec. 5724. The comparatively high wages and bonuses paid union soldiers during the Civil War had encouraged im-

migration. The great post-Civil War boom in railroad construction resulted in the importation of cheap labor. Railroad company agents scoured Europe to entice immigrants to settle on the railroad land grants in the West. High tariffs led to the "contract labor system," which was followed by the "sweating system." Coupled with this increase in man-power, technological advances had increased output per man. H. Rep. 1267, 52 Cong., 1st sess. It was also urged in support of the bill that shorter hours of work would provide opportunity for physical recuperation and for social and intellectual improvement, but a primary purpose of Congress was to spread the available work. *Ibid;* 23 Cong. Rec. 5724, 5725, 5728, 5732. The Eight Hour Law of 1892 was merely one of a series of laws designed to accomplish this end; prior acts had attempted to reduce the supply of foreign labor. See Chinese Exclusion Act (Act of May 6, 1882, 22 Stat. 58); Contract Labor Act (Act of February 26, 1885, 23 Stat. 332).

Because the Act of 1892 had been construed (26 Op. A. G. 30) not to apply to work done on private property by contractors for the Government (e. g., private shipyards, manufacturers of armor plate), the act was amended in 1912, to cover *every* contract to which the United States, any Territory, or the District of Columbia is a party. Act of June 19, 1912, 37 Stat. 137, 40 U. S. C. 324; 48 Cong. Rec. 381, 385, 394–395. There is no indica-

tion that the word "every", here first utilized in the text of the Eight Hour Law, was intended to extend the geographical limits of the act, as held by the court below; the contrary is revealed by one passage in the debates. The proposed bill (H. R. 9061, 62d Cong., 2d sess.) required violations of the Eight Hour Law to be reported to the "proper officer." 40 U. S. C. 324. An amendment was offered to require that violations be reported to the District Attorney having jurisdiction in the place where the work was performed. It was rejected solely because the bill imposed civil penalties which were not within the scope of a District Attorney's duties. 48 Cong. Rec. 393–394. The debate on report *vel non* to local District Attorneys indicates clearly that Congress viewed the statute as applying solely within territory under the sovereignty of the United States.[7]

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[7] The 1892 Act was again amended by the Act of March 3, 1913, 37 Stat. 726. This amendment extended the eight hour principle to persons employed "to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia." In 1907, the Supreme Court had ruled that dredge workers were seamen and not "laborers and mechanics" under the Eight Hour Law: *Ellis* v. *United States*, 206 U. S. 246. The language of the 1913 amendment, which was, of course, intended to be in consonance with the rest of the statute, strongly indicates that the Eight Hour Law was not intended to be for extraterritorial application. Cf. Mr. Justice Holmes' remark in *Ellis* v. *United States*, 206 U. S. at p. 259, "* * * the most natural meaning of 'of the United States' is belonging to the United States."

Because of the war emergency in 1917, Congress authorized the President to suspend the Eight Hour Law as to contractors, provided that overtime rates be paid for all hours of work in excess of eight hours. Act of March 4, 1917, 39 Stat. 1192, 40 U. S. C. 326. Here also, the problem faced by Congress was one of domestic employment conditions. Debates on this proposal, passed as a rider to the Naval Appropriation Act of 1917, 39 Stat. 1168, appear to have been confined to discussion of the shortage of labor in American shipyards. 54 Cong. Rec. 2586–2590, 3150–3151.

The War and Defense Contract Act (Act of June 28, 1940, 54 Stat. 676, 678) suspended the Eight Hour Law for the duration of the emergency as to persons engaged upon work covered by Army, Navy, and Coast Guard contracts. Because of confusion resulting to contractors engaged upon work for other agencies in addition to the Army and Navy, a rider was attached to the Second Supplemental National Defense Appropriation Act (Act of September 9, 1940, 54 Stat. 884, 40 U. S. C. 325a), which permitted daily hours of work in excess of eight upon payment of overtime for all contracts covered by 40 U. S. C. 324–325. This amendment was accepted with practically no discussion. 86 Cong. Rec. 11216–11217.

Thus, as shown by the analysis of the Eight Hour Law in its development from the Act of 1868

to its present form, the act was meant to deal solely with domestic economic problems. There is no suggestion of any Congressional purpose to extend the statute's scope to the performance of Government contracts in foreign countries. There is thus no basis for not giving effect to the normal presumption against extraterritorial coverage.

C. CONGRESS HAS SPECIFICALLY DECLINED TO EXTEND THE GEOGRAPHICAL SCOPE OF MORE RECENT WAGE-HOUR LAWS *IN PARI MATERIA*

It is settled that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277; cf. *United States* v. *Hutcheson*, 312 U. S. 219. For when Congress, acting over a period of years, passes a series of statutes dealing with the same general subject matter, the acts are to be construed in their historic setting as segments of an integrated whole.

The original Eight Hour Law was enacted in 1892 (Act of August 1, 1892, 27 Stat. 340), a time when Congressional policy with regard to bettering labor conditions was in its infancy as compared to the legislative attitude at the time of the passage of the Bacon-Davis and Fair Labor Standards Acts. Yet, the geographic scope of these later statutes is expressly restricted to the United States and its territories and possessions.

See Bacon-Davis Act, 40 U. S. C. 276a; Section 3 (c) of the Fair Labor Standards Act, 29 U. S. C. 203 (c); *Burns* v. *Metcalfe Const. Co.*, 69 F. Supp. 381 (W. D. Mo.); *Bernhard* v. *Metcalfe Const. Co.*, 64 F. Supp. 953 (D. Neb.); *Filardo* v. *Foley Bros., Inc.*, 181 Misc. 136 (Sup. Ct. N. Y. County).[8] Similarly the Walsh-Healey Act (41 U. S. C. 35, *et seq.*) by regulation of the Secretary of Labor, issued pursuant to his power to grant exemptions from the Act (41 U. S. C. 40), excludes contracts to be performed outside the geographic limits of the United States and its territories.[9] 41 C. F. R. 201.603, 41 U. S. C.

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[8] This *Filardo* v. *Foley* case involved a suit by respondent against petitioners herein for the same overtime compensation as here involved. That suit was, however, brought under the Fair Labor Standards Act, and Judge Pecora ordered the complaint dismissed on the ground that the Fair Labor Standards Act does not apply extraterritorially.

[9] A reading of the Act reveals that the regulation issued by the Secretary of Labor merely makes explicit the implicit limitation on the territorial coverage of the various sections. E. g., The Secretary of Labor is to determine as a minimum wage the prevailing wage of the locality (§ 35 (b)) (clearly the Congress did not intend to adopt the lower wage scales of foreign countries for American citizens); compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed is prima facie evidence of compliance with this subsection (§ 35 (e)); the Secretary of Labor is authorized to utilize, with the consent of the State, such State and local officers and employees as he finds necessary to assist in administration (§ 38); the Secretary of Labor is authorized to make investigations and prosecute any inquiry necessary to his functions in any part of the United States (§ 38).

Appendix 201.603. Moreover, under Section 2 (b) of the Miller Act (40 U. S. C. 270b (b)) suits instituted on payment bonds may be brought only in the United States District Court for the district in which the contract was to be performed;[10] this Court has recognized that these bonds are required for the protection of the contractor's employees. *MacEvoy Co.* v. *United States,* 322 U. S. 102, 104, and cases cited.

All these statutes[11] indicate that, even though the benevolent policy of the Government with regard to working conditions has been greatly developed and expanded, Congress has not yet made, but on the contrary has specifically declined to make, the extension which the court below finds by implication in the Eight Hour Law, the applicability of that policy to work performed in foreign countries. On the other hand, where Congress does intend welfare legislation to apply extraterritorially, it has not relied upon implications of general language but has explicitly provided for such application. Defense Bases Act, Act of

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[10] The Miller Act is a reenactment of the Heard Act (Act of August 13, 1894, 28 Stat. 278), as amended by the Act of February 24, 1905, 33 Stat. 811.

[11] It should also be noted that although the Copeland ("Kickback") Act, Act of June 13, 1934, 48 Stat. 948, 40 U. S. C. 276b, does not specify the geographical limits of its application, by regulation of the Secretary of Labor the Act is applicable only within the United States, the District of Columbia and the Territories of Alaska and Hawaii. 7 F. R. 687, 40 U. S. C. App. §2.1.

August 16, 1941, 55 Stat. 622, as amended by the Act of December 2, 1942, 56 Stat. 1035, 42 U. S. C. 1651.

D. THE ADMINISTRATIVE CONSTRUCTION OF THE EIGHT HOUR LAW SUPPORTS THE CONCLUSION THAT IT IS NOT INTENDED TO HAVE EXTRATERRITORIAL APPLICATION

The need for engaging in foreign construction on a large scale under Government contract is of recent origin, and the administration of the Eight Hour Law, insofar as it touches on the problem of extraterritoriality, is of equally recent development. The information available clearly demonstrates that the Eight Hour Law has not been considered, by those in charge of foreign construction or procurement, as a Congressional requirement governing foreign contracting operations. Although Section 324 expressly requires an Eight Hour Law provision to be included in every Government contract,[12] it is significant that the Secretary of the Treasury has approved standard construction contract forms, containing an Eight Hour Law clause, which provide that the form will not be required for construction in foreign countries. U. S. Standard Form No. 23, Revised April 3, 1942, 41 U. S. C. (1946 ed.) Appendix 12.23, pp. 4520, 4522. In addition, the instant prime contract and other similar negotiated contracts did not include the standard Eight Hour Law

[12] See 18 Comp. Gen. 337, 646; 20 Comp. Gen. 890; 21 Comp. Gen. 1110; 24 Comp. Gen. 376.

clause required to be incorporated by W. D. Procurement Regulation No. 346; Army Procurement Regulations, Paragraph 5–402.3.[13]

None of the 900 foreign procurement contracts entered into by the Board of Economic Warfare included an Eight Hour Law provision.[14] Significantly, the Department of State, which until World War II was the only Government agency continuously engaged in substantial foreign construction, advises that it has not considered the inclusion of an Eight Hour Law clause legally necessary for construction to be performed in foreign countries. See Appendix B, *infra*, pp. 55–56.

Executive Order No. 8623, December 31, 1940, Code of Fed. Reg. Cum. Supp. Tit. 3, p. 850, cited by the court below (R. 136), suspended the Eight Hour Law as to laborers and mechanics employed directly by the Government at bases acquired from Great Britain. But there has been controversy as to whether these bases were "possessions" of the United States within the meaning of stat-

[13] The Department of the Army advises that none of the contracts for off-continent operations contained the Eight Hour Law clause. Illustrative contracts are as follows: W 1098 eng—1525, June 8, 1942 (Labrador and Buffin Island); W 1098 eng—1375, June 3, 1942 (Cuba); W 1098 eng—1350, April 24, 1942 (Bahamas); W 1098 eng—108, November 10, 1941 (North Africa and Palestine); W 1098 eng—2, August 2, 1941 (Greenland); W 258 eng—54, February 8, 1941 (Newfoundland); W 958 eng—50, February 4, 1941 (Bermuda).

[14] Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141, 146–147.

utes not operating extraterritorially. See *Connell* v. *Vermilya-Brown Co.*, 164 F. 2d 924 (C. C. A. 2), now awaiting decision in this Court, No. 22. The Order excluding such possessions from the Eight Hour Law out of proper caution does not indicate that the President thought similar action necessary for territory unquestionably foreign. Any other conclusion would bring the conduct of the various agencies just referred to into conflict with the views of the President.

E. ADVISORY OPINIONS UNDER THE EIGHT HOUR LAW, TAKEN TOGETHER, DO NOT SUPPORT THE VIEW THAT THE STATUTE IS OF EXTRATERRITORIAL APPLICATION

Appellant's primary reliance in support of the claim that the Eight Hour Law has extraterritorial force is an opinion rendered by Attorney General Moody in 1905. 25 Op. Atty. Gen. 441. The question presented to Attorney General Moody was whether the Eight Hour Law, applied to laborers and mechanics—clearly including both American and alien—employed in the construction of the Panama Canal. Although the Canal Zone was subject to the sovereign authority of the United States, at that time Congress had not legislated for it, and the President, acting pursuant to general authority delegated to him, had directed that local laws should remain in force until superseded. *Id.* at 443. Since there were no local laws affecting the subject, Attorney General Moody

declared that, although the Canal Zone was within the sovereign jurisdiction of the United States, "the case stands, so far as the applicability of the act of 1892 is concerned, exactly as if the territory were beyond the legislative power of the United States" (p. 444). He then ruled that Congress had power to fix the hours of labor for Government agents and contractors outside the territory of the United States, that the literal words of the Eight Hour Law did so, and that there was nothing absurd in giving the law such a literal interpretation.

Attorney General Moody's opinion, however, has subsequently been limited and at least partly overruled in an opinion by Attorney General Stone in 1924. 34 Op. Atty. Gen. 257. The State Department had asked whether the Eight Hour Law applied to laborers and mechanics (who were English) engaged in altering the American Embassy in London. Attorney General Stone ruled that the act did not extend to such alien laborers, stating that (pp. 259–260):

> The language of the Acts of June 19, 1912, and August 1, 1892, supra, is broad enough to include public works of the United States situated outside of the territorial limits of the United States, provided it was the intent of Congress to do so. But the statute contains no provision, express or implied, which would indicate that it was the intent of Congress to apply its terms to laborers and mechanics of foreign coun-

tries, employed temporarily upon the public works of the United States situated within the territorial limits of a foreign country.

The purpose of the statute under consideration is for the improvement of labor conditions. Can there then be imputed to Congress the intent to better labor conditions in a foreign country or benefit alien laborers and mechanics employed outside the territorial jurisdiction of the United States, even when the enforcement of the statutory provision would disturb the agreements entered into between contractors and laborers and mechanics in a foreign country?

In the absence of express provisions in the statute plainly indicating the intent of Congress to apply the restrictions of the Act to the employment of alien labor on public works of the United States being performed in a foreign country, I do not think such intent can be imputed.[15]

Attorney General Stone then adverted to the prior opinion of Attorney General Moody. Although he concurred in the opinion expressed by Attorney General Moody that Congress may,

[15] To the same effect see 19 Comp. Gen. 516, in which both the Secretary of State and the Comptroller General indicated that the extraterritorial application of the law might easily lead to serious difficulties in effecting contracts in countries where social and business conditions and customs differ widely from our own. See also 29 Op. Atty. Gen. 488; cf. Mathews, *Labor Standards Provisions in Government Foreign Procurement Contracts*, 42 Ill. L. Rev. 141.

if it chooses, fix the hours of labor on the work of the United States wherever it is conducted, he observed, "* * * it must be remembered that the question under consideration by Attorney General Moody was the application of the Act of 1892 to laborers and mechanics upon the public works of the United States within the Canal Zone. At the time the work in question was being performed, the United States, by a treaty with the Republic of Panama, had acquired 'all the rights, power and authority within the zone mentioned * * * which the United States would possess and exercise if it were the sovereign of the territory * * * to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.'" (Pp. 260–261.)

Attorney General Stone went on to declare that (p. 261):

> While it is a well settled principle of construction that the meaning of the legislature is to be determined, if possible, from the language of the Act, yet it is equally well established that a statute should be construed with reference to the purpose to be accomplished and the mischief to be corrected.

He concluded that this principle of construction required that the Act not be given a literal interpretation with respect to extraterritorial coverage.

It is clear that Attorney General Stone's opinion partly overruled Attorney General Moody's, inasmuch as the latter had indicated that both alien and American workers under Government contracts in foreign countries were covered by the Eight Hour Law. Attorney General Stone's opinion, which related only to alien workers, leaves open the status of American employees. But since Attorney General Moody had not differentiated between aliens and Americans, we believe that his reasoning has to a large extent been undermined by the subsequent opinion, and that the authority of his ruling has thus been considerably decreased. And, as Attorney General Stone noted, the earlier opinion was in fact dealing with the Canal Zone, not with foreign countries, so that it is not strictly in point with respect to the latter despite its reasoning.

We have discussed these opinions at perhaps undue length because of respondent's heavy reliance upon Attorney General Moody's opinion. But whether Attorney General Moody's statements have been overruled or merely limited, or whether they were dicta except as applied to the Canal Zone, is obviously not of controlling importance.[16] His opinion is no more binding on the courts with respect to the construction of a

[16] It is to be noted that Attorney General Moody's opinion was promptly overturned by Congress when in 1906 it excluded the construction of the Panama Canal from the Eight Hour Law. 34 Stat. 669.

statute than is the opinion of the present Attorney General. Since Attorney General Stone's opinion undermines the reasoning of Attorney General Moody and leaves the present question open, we think it fair to say that whether the Act applies to American workers in foreign countries is not governed by any authoritative ruling of the Attorney General.

Respondent also relies on a letter furnished in response to his request by an assistant solicitor of the Department of Labor. This letter merely reviews the two Attorney Generals' opinions, and states that "the conclusion seems to be that the Eight-Hour Law is applicable to an American citizen working in a foreign country, provided that the worker otherwise comes within the provisions of the Act." The assistant solicitor gave no independent opinion on behalf of the Department of Labor. It should be noted, moreover, that the Department of Labor does not administer the Eight Hour Law.

Although the opinion of Attorney General Stone deals only with alien labor in a foreign country, because the inquiry from the Secretary of State was so phrased, there is nothing in the statute to justify an extraterritorial application to American citizens, while excluding aliens. Such a differentiation between Americans and aliens would have to be read into the language of the act.

On the contrary, an interpretation of the act which permits uniformity of treatment as to hours of work of American citizens and aliens engaged on foreign projects accords with the realities of working conditions in overseas construction. Respondent's interpretation would lead to discord and confusion, since it would require payment of overtime to Americans but not aliens working on the same project. Prior to the 1940 amendment that interpretation would have meant that contractors on public works in foreign countries would have been faced with the choice of operating on a work schedule comprising concurrent shifts of unequal hours, employing no American labor, or working native labor on an eight hour day also. This same dilemma would face the Government today as to its own employees under Section 321, the Eight Hour provision being suspended only "in case of extraordinary emergency." Congress has specifically recognized the need for uniformity of treatment as to hours of labor in overseas construction. In appropriating money for the construction of the Panama Canal in the General Deficiencies Act of 1906 (Act of June 30, 1906, 34 Stat. 669), it provided that the Eight Hour Law should not apply to foremen and superintendents [i. e., American laborers] as well as to unskilled alien laborers.[17] It is significant that where Congress intended labor legislation to apply to construction work in foreign countries, it has expressly included aliens and American citizens within the

[17] See Appendix C, *infra*, p. 57.

coverage of the benefits. Defense Bases Act of August 16, 1941, Sec. 2, 55 Stat. 622, 42 U. S. C. 1652 (b), making the workmen's compensation system embodied in the Longshoremen and Harbor Workers Act applicable to some extraterritorial contracts.

II

THE EIGHT HOUR LAW DOES NOT CONFER A STATUTORY RIGHT TO SUE UPON EMPLOYEES

The argument in support of the position of the Department of the Army on this point is as follows:

Prior to the 1940 amendment, the Eight Hour Law clearly did not afford any individual worker a right to recover compensation. It merely imposed civil and criminal penalties upon a contractor for requiring employees to work over eight hours a day. That the purpose of the law was not to benefit the individual employees is indicated by the following statement made by a sponsor of the legislation during the debates on the Act of 1892 (now 40 U. S. C. 321):

> *It never was the spirit of the eight-hour law to permit men to work ten hours and pay them for a day and quarter's time.* It was not intended as a great boon to those men who were so fortunate as to be in the Government service at the time. The spirit and intent of the law was, that if there is more work than can be done by a certain number of men in eight hours, that

> more men shall be employed, that thereby the enforced idle element shall be drawn into the ranks of industry, the result *a general benefit to all.* [Italics supplied.] [23 Cong. Rec. 5728; see 29 Op. A. G. 488, 492.]

The court below recognized that no employee would have had the right to compensation prior to the 1940 amendment, and this was clearly established by the earlier authorities. *United States* v. *Martin,* 94 U. S. 400; *United States* v. *Moses,* 126 Fed. 58 (C. C. A. 9), certiorari denied, 195 U. S. 632; *Timmonds v. United States,* 84 Fed. 933 (C. C. A. 7); *Coleman* v. *United States,* 81 Fed. 824 (D. Ky.); see *Swisher* v. *United States,* 57 C. Cls. 123.

The 1940 amendment, however, provided, as we have seen, that:

> work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay.

This amendment is framed in terms of a suspension of the absolute bar previously imposed under the Eight Hour Law, upon the condition of payment of time and one-half for work in excess of eight hours per day. Thus, it is merely permissive, as distinct from restrictive or prohibitive. It seems clear that Congress did not intend this amendment suspending the act con-

ditionally because of the war emergency to convert the law from a mandatory directive to Government agents and contractors (cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 129) supported by sanctions enforceable by the Government to a grant of a right of action to employees. The amendment was enacted at a time when the Nation's security was threatened, when the need for labor was acute, and is concerned only with the relaxation of the limitation on employment in excess of eight hours in order to make that labor available. It merely altered the content of the mandate to meet pressing current needs, relaxing the absolute prohibition of the Law as it stood prior to 1940. 20 Comp. Gen. 233, 235–236; 21 Comp. Gen. 1110, 1112; 24 Comp. Gen. 376, 377; cf. *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, 949 (C. C. A. 6). The amendment cannot be regarded as having changed the basic purpose of the Act to the protection of the individual worker, as distinct from the general benefit to be derived from spreading the work among as many persons as possible.[18]

[18] For this reason, *United States* v. *Post*, 148 U. S. 124, relied upon by the court below (R. 134), is irrelevant. The dispute in that case was between the Government and its employees under the Letter Carriers Act, 25 Stat. 157, and not between contractors and their employees. That Act was not a directive to Government agents as to the terms under which the Government would contract. It directly fixed the hours of work of the Government's own employees and specifically provided that they "shall be paid extra" for hours of work in excess of eight.

Nor could such a drastic change of policy be based on the meager legislative history of the amendment. On June 28, 1940, about three months prior to the enactment of the amendment, Congress had provided for the suspension, during the period of national emergency, of the Eight Hour Law as applied to civilian employees of the War and Navy Departments and the Coast Guard "where additional employees cannot be obtained to meet the exigencies of the situation," and for the payment of one and a half times the regular rate for overtime work to these employees. Act of June 28, 1940, c. 440, Sec. 5 (a), 54 Stat. 676, 678, 50 U. S. C. App. 1155 (a). Section 5 (b) of that statute suspended without more the Eight Hour Law as applied to persons engaged in work covered by Army, Navy or Coast Guard contracts. It was to eliminate the confusion resulting from the limited coverage of Section 5 (b) that the amendment to the Eight Hour Law here involved was enacted on September 9, 1940. It was added to H. R. 10263, 76th Cong., 3d Sess., which became the Second Supplemental National Defense Appropriation Act, 1941 (54 Stat. 872, 884), by amendment offered from the Senate Floor by Senator McKellar. The amendment was accepted with practically no discussion. Senator Thomas did insert a statement explaining the amendment's purpose in the Rec-

ord (86 Cong. Rec. 11216–11217).[19] As a result of Conference, the Managers on behalf of the House of Representatives initially recommended disagreement with the proposed amendment (H. Rep. 2916, 76th Cong., 3d Sess., p. 5), but when the question came up for discussion on the floor of the House, it was moved, and the House voted without discussion, to recede from its disagreement and concur in the Senate amendment. 86 Cong. Rec. 11569.

It is, of course, true that "where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law" (*Texas & Pacific Ry.* v. *Rigsby,* 241 U. S. 33, 39),[20] unless a contrary

[19] Senator Thomas there stated that by the amendment "it is * * * proposed that the rigid limitations of the existing 8-hour law of 1912 be modified by permitting work in excess of 8 hours per day but subject to the requirement that overtime work be compensated at not less than time and one-half the regular rate of pay."

[20] Although this canon of construction was approved in *Texas and Pacific Ry.* v. *Rigsby*, primary reliance in that case was placed on the language of the Safety Appliance Acts, which were in issue. The Court pointed out that the inference of a private right of action was rendered irresistible by the provision of Section 8 of the Act of 1893 (45 U. S. C. 7) that an employee injured by any car, etc., in use contrary to the Act shall not be deemed to have assumed the risk, and by the reservation of liability in Section 4 of the supplement of 1910 (45 U. S. C. 13) in any remedial action for the death or injury of any railroad employee.

legislative intention appears. The question here is whether the Eight Hour Law was enacted for the benefit of those individuals who were working for Government contractors. Clearly, before 1940 it was not. The main purpose was to benefit the public by reducing unemployment, to benefit the great mass of workers as a whole, not those who were presently employed by the contractors. The suspension of the absolute prohibition and the substitution of the overtime compensation requirement did not change the underlying purpose of the Act. The extra cost of overtime work still tended to spread the work among more persons by inducing the employer to avoid work over eight hours per day as much as possible. Cf. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577–578. Only when additional employees could not be secured would the employer avail himself of the more expensive alternative.

The amendment does not stand on its own feet as separate legislation.[21] Any failure upon the part of the contractor to pay time and one-half for work in excess of eight hours daily is a vio-

[21] It is the opinion of the Comptroller General that the 1940 amendment would be subject to the escape clause of section 325, that no overtime payments would be required in case of emergency caused by fire, famine, or flood, or other extraordinary events, in order to avoid civil sanctions. 20 Comp. Gen. 233, 235–237. Furthermore, a clause inserted into a contract which provided merely that the contract is subject to the 1940 amendment would not be sufficient compliance with the requirements of the Eight Hour Law (40 U. S. C. 324). 24 Comp. Gen. 376, 378.

lation of the law as it previously stood and not of the 1940 amendment—a violation which relates to the hours worked and not to the wages paid. Accordingly the underlying purpose of the law still seems to be the general advantage to the community from spreading the work among more persons, not an intention to compensate individual workers for overtime.

To change a law so long regarded as merely declaratory of public policy, and penal in its nature, into a statute affording to aggrieved employees a remedy by court action calls for a clearer expression of legislative purpose than has been here manifested by Congress. As already indicated, Congress imposed criminal sanctions for the intentional violation of the Eight Hour Law (40 U. S. C. 321). In addition, the contractor is subjected to civil sanctions in the form of a withholding of a $5 penalty for each violation of the Law, with an express provision for a remedy, administrative and judicial, whereby the contractor may recover improperly imposed penalties. The Law is silent as to any judicial and administrative machinery made available to employees, and we believe this silence to be significant.

Where Congress has intended to provide a statutory procedure, administrative or judicial, whereby an employee was to receive compensation, it has experienced no difficulty in expressly doing so in the various statutes enacted within

five years prior to the 1940 amendment. Under Section 16 (b) of the Fair Labor Standards Act, 29 U. S. C. 216 (b), the employee himself may bring suit against his employer for the overtime compensation to which he is entitled under the Act. Under the Bacon-Davis Act, as amended by the Act of August 30, 1935, 49 Stat. 1011, 40 U. S. C. 276a, 276a–2, employees receive that compensation from the Comptroller General who is authorized to withhold the necessary monies and to pay it over to them; and if the payments withheld are insufficient to reimburse all the employees, the Act further provides that they may bring suit for the difference in the name of the United States to their own use against the contractor or his surety in accordance with the provisions of the Miller Act. The Walsh-Healey Act, 41 U. S. C. 36, provides for the withholding of monies due on contracts or recovery thereof for underpayments of wages through a suit brought in the name of the United States by the Attorney General, and for the payment of such monies, on order of the Secretary of Labor, over to the employees concerned.[22]

[22] A memorandum submitted by the Solicitor of the Department of Labor to Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st sess., Hearings on proposed amendments of the Fair Labor Standards Act, pages 2719–2720, suggests that employees may have a right to sue under the Walsh-Healey Act and the Bacon-Davis Act, reviewing legislative statements in connection with the Portal-to-Portal Act which might lead to that conclusion.

In this connection, the enactment of the recent Portal-to-Portal Pay Act, 61 Stat. 84, 29 U. S. C., Supp. I, 251, *et seq.*, is also significant. By this statute, Congress restricted the rights of employees to recover for claims in various situations arising under the Fair Labor Standards Act. The same restrictions were specifically extended to the Bacon-Davis and Walsh-Healey Acts in order to eliminate the possibility that claims of the type which Congress intended to ban might reappear by use of statutes other than the Fair Labor Standards Act. The absence of a reference in the Portal Act to the Eight Hour Law affords a fair basis for the assumption, that the latter statute was not deemed to have any connection with the question of employee suits.

Many cases hold that when a legislature creates new statutory rights, the remedies it provides to enforce those rights are exclusive, and no other remedies may be resorted to. The Eight Hour Law, like the Sherman Act, is such a statute. This Court has frequently held that "the Sherman Act * * * created new rights and remedies which are available only to those on whom they are conferred by the Act" (*United States* v. *Cooper Corp.*, 312 U. S. 600, 604). See to the same effect *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 755; *D. R. Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174–175; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471. In the

Wilder case, the Court stated (236 U. S., at 174–175):

> It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes."

In the *Wilder* case the Court also attributed significance to the fact that the purpose of the Sherman Act was to "protect the whole public". *Ibid.*

The Court has similarly held that the National Labor Relations Act can only be enforced in the manner prescribed in the statute, and that private organizations injured by a violation have no standing to enforce the Act on their own account. *Amalgamated Utilities Workers* v. *Consolidated Edison Co.*, 309 U. S. 261. Similarly, Section 5 of the Federal Trade Commission Act was construed by the Court as not providing private persons with administrative remedies for private wrongs. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25. This Court has also held that under the copyright law a person has no remedies other than those created by the statute. *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356.

The decisive factor, of course, is the intention of Congress, and it would seem to be the normal presumption that when Congress creates a duty and specifically sets forth several sanctions by which the statutory obligation is to be enforced, the prescribed methods of enforcement would seem to be the only ones which Congress contemplated. A different situation is presented where a right is created but no sanction provided for, as in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. In such circumstances it is necessary to permit a private suit for enforcement if the congressional purpose is to be effectuated.

But the Eight Hour Law seems clearly to fall in the same class as the Sherman Act, inasmuch as the statute itself contains several sanctions. If these are not regarded as sufficient to enforce compliance, the appropriate procedure is to ask Congress to amend the law, not to have the courts create a remedy which Congress did not think necessary.

III

RESPONDENT HAS NO INDEPENDENT STANDING TO SUE AS THIRD PARTY BENEFICIARY

The court below held that, apart from the Eight Hour Law itself, respondent was entitled to recover as third party beneficiary of the contract between the Government and petitioners. We submit that respondent has no right under the

contract unless he has a right under the statute—and if he has a right under the statute, he can recover irrespective of the contract.

The holding below that respondent could recover as a third party beneficiary of the contract between petitioners and the Government is necessarily predicated on the inclusion in the contract of the requirements of the Eight Hour Law. The contract did not contain an Eight Hour Law provision, the specific inclusion of which is mandatory where the contract is administratively considered to be subject to the Law.[23] 40 U. S. C. 324; see W. D. Procurement Regulation No. 346; Army Procurement Regulations, Paragraph 5–402.3; 18 Comp. Gen. 646; 20 Comp. Gen. 890; 21 Comp. Gen. 1110; 24 Comp. Gen. 376. Without regard to the contrary administrative view here evidenced by the omission of such a specific provision, the court below read the Law into the contract on the basis of the customary general provision that petitioners "obey and abide by all applicable laws * * * of the United States"[24] (R. 98).

Even assuming, *arguendo*, that this general provision suffices to import the Eight Hour Law into the contract, it does not necessarily follow

[23] See U. S. Standard Form No. 23 (Rev.) Art. 11, printed in 41 U. S. C. (1946 ed.), Appendix 12.23, p. 4520.

[24] Cf. *Greenstein* v. *Pan American Airways, Inc.*, 185 Misc. 429, 431–432 (Sup. Ct. N. Y.) wherein the court held "meaningless" an allegation that the defendant had contracted that it would comply "with all the statutes, rules and regulations of the United States, affecting the employment of labor."

that respondent here may sue as a third party beneficiary. That question, involving the construction of the contract between petitioner and the United States is, as the court below recognized (R. 137), one of federal, rather than state, law. *Caldarola* v. *Eckert,* 332 U. S. 155, 158; *United States* v. *Allegheny County,* 322 U. S. 174, 185; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 366–367. As formulated by this Court, the federal rule as to third party beneficiaries appears to be that "before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit." *German Alliance Insurance Co.* v. *Home Water Supply Co.,* 226 U. S. 220, 230; *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U. S. 303, 307–308; *National Bank* v. *Grand Lodge,* 98 U. S. 123; cf. *Prescott* v. *Collins,* 263 App. Div. 690, appeal dismissed, 290 N. Y. 811.[25]

"While all the activities of a government of course confer benefits on its citizens, frequently the benefits are incidental and unenforceable." *United States* v. *National Surety Corp.,* 309 U. S.

[25] This appears to be the general rule for the determination of a claimant's status as donee rather than as creditor beneficiary, the former type being involved in this case. See 2 Williston, *Contracts,* § 356A (Rev. Ed. 1936). The court below did not suggest any difference between Federal law, New York law, and the general common law, but assumed them to be the same. (R. 137).

165, 170. It is a general rule that contracts for public advantage are for the benefit of the community as a whole, not for the sole benefit of individual inhabitants. See 2 Williston, *Contracts*, § 373 (Rev. ed. 1936). As restated by the American Law Institute, "a promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so * * *." See *Restatement, Contracts*, § 145.[26] Thus, where a water company contracts to supply water to a municipality and the property of an inhabitant is destroyed by fire because of the failure of the company to supply water, it is the federal rule that there is no liability. *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220; cf. *Moch Co.* v. *Rensselaer Water Co.*, 247 N. Y. 160. Similarly, a user of the mails was denied recovery of consequential damages resulting from misdelivery of mail in a suit on a postmaster's bond, of which the United States was obligee. *United States* v. *National Surety Corp.*, 309 U. S. 165;

[26] § 145 (a) imposes liability where the intent is manifest in the contract, in light of the circumstances surrounding its formation, that the promisor shall make compensation. The illustrations under § 145 (a) are cases of explicit promises to indemnify for damage.

cf. *Thomas P. Nichols & Son* v. *National City Bank*, 313 Mass. 421, certiorari denied, 320 U. S. 742 (F. D. I. C. contract).

It seems clear that the general catch-all agreement to abide by all applicable laws was meant only to insure protection of the public interest in obedience to law, not independently to benefit private individuals. It may well be that if any of the applicable laws accorded enforceable rights to individuals, the contractual provision can be regarded as recognizing such rights. But in that event the individual would possess the right apart from the contracts. The general reference to applicable laws obviously does not create greater rights than the laws themselves.

Even if we assume that the catch-all provision in the contract can be regarded as intended directly to aid persons who would be beneficiaries of the various statutes which petitioners were agreeing to obey, whether the provision was intended to benefit persons in the class of respondent would relate back to the intent of the Eight Hour Law. The court below, by carrying over its holding that the law was intended for the benefit and protection of employees to this phase of the case, had no difficulty in holding respondent a third party beneficiary. (R. 137). But if the law was intended for the benefit of the employees, they would have a right to sue under the statute without regard for the contract. See *Texas & Pacific Ry.* v.

Rigsby, 241 U. S. 33, 39, *supra*, p. 36. If, however, as argued in Point II, the law was not intended to confer a direct benefit on employees, but to benefit the public by spreading the work, then the employees could not be regarded as direct beneficiaries of the contractual provision embodying the law and would have no right to sue as third party beneficiaries. Since the test of benefit seems to be the same in determining whether the statute allows enforcement by private individuals and in determining whether an individual can sue as third party beneficiary, the latter issue is of no independent significance.

In conclusion it should be noted that this case differs from other third party beneficiary situations, in that there was a formal written contract between the petitioners and respondent. Respondent's contract of employment with petitioners required him "*to devote all of his time and attention* and give his best efforts and skill to the performance of such services in and about such projects as the Constructors may from time to time assign to him" (emphasis supplied) (R. 89). The employment contract did not contain any provision for overtime pay; respondent's weekly salary was set pursuant to a formula which set his wage at 150% of 85% of the New York prevailing wage rates (R. 60). The third party beneficiary doctrine would seem to have no application when a contract between the alleged promisor

and the third party fully details the rights and obligations of both parties.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.

H. GRAHAM MORRISON,
Assistant Attorney General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.

NOVEMBER 1948.

APPENDIX A

The pertinent provisions of the Eight Hour Law, 40 U. S. C. 321 *et seq.* are as follows:

§ 321. Eight-hour day on public works; river and harbor dredging; longer hours unlawful.

The service and employment of all laborers and mechanics who are or may be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are or may be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such

person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this section and section 322 of this title, shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock-excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States. (Aug. 1, 1892, ch. 352, § 1, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

§ 322. Violation of act punishable.

Any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of section 321 of this title, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed $1,000, or by imprisonment for not

more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof. (Aug. 1, 1892, ch. 352, § 2, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

* * * * *

§ 324. Public contracts to provide for eight-hour day; stipulation for penalty; inspectors to report violations; deduction of penalty; appeals; right of action in Court of Claims.

Every contract made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of $5 for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any officer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this section directed to be

made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or subcontractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court. (June 19, 1912, ch. 174, § 1, 37 Stat. 137.)

§ 325. Same; contracts excepted; work included; waiver in time of war; when pen-

alty not to be imposed; eight-hour law not affected.

Nothing in section 324 of this title shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided,* That all classes of work which have been, or may be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisons of section 324 of this title. The President, by Executive Order, may waive the provisions and stipulations in this section and section 324 of this title as to any specific contract or contracts during time of war or at a time when war is imminent. No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the volation to have been excusable. Nothing in this section of section 324 of this title shall be construed

to repeal or modify sections 321–323 of this title, or apply to contracts entered into under the provisions of appropriation Acts approved prior to June 19, 1912. (June 19, 1912, ch. 174, § 2, 37 Stat. 138.)

§ 325a. Same; computation of wages on basic day rate of eight hours; work in excess of day rate.

Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. (Sept. 9, 1940, 9 a. nf., E. S. T., ch. 717, title III, § 303, 54 Stat. 884.)

§ 326. Suspension of eight-hour law in case of emergency; overtime pay.

In case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States: *Provided,* That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half for all hours worked in excess of eight hours. (Mar. 4, 1917, ch. 180, 39 Stat. 1192.)

APPENDIX B

"DEPARTMENT OF STATE

"Washington

NOVEMBER 8, 1948.

"In reply refer to
L: L/A: 811.5041/
11-348

"MY DEAR MR. ATTORNEY GENERAL:

"Reference is made to the letter from Mr. H. G. Morison, Assistant Attorney General, of November 3, 1948 (File HGM: BF), requesting a formal statement by the Department regarding its administrative practice with respect to including provisions of the Eight Hour Law in construction contracts to be performed in foreign countries.

"The Act of June 19, 1912, 37 Stat. 137, referred to as the Eight Hour Law, which requires in section 1 that every contract entered into by the United States involving the employment of laborers or mechanics shall contain a provision that no laborer or mechanic shall be required or permitted to work more than eight hours in any one calendar day upon such work, has not been construed as being applicable in foreign countries.

"While the law itself is sufficiently broad to embrace contracts executed by the United States for work to be done in foreign countries, the Comptroller General has held in 19 C. G. 516 that this statute need not be interpreted strictly according to the letter of the law when to do so

would contravene the intent of Congress by not taking into consideration its evident spirit and intent.

"In this connection your attention is invited to section 3 of the Act of May 7, 1926, 44 Stat. 404, 22 U. S. C. 294, which provides that the contracts for all work of construction, alteration, and repair under sections of the Foreign Service Buildings Act are authorized to be negotiated, the terms of the contracts to be prescribed without regard to such statutory provisions as relate to the negotiation, making, and performance of contracts and performance of work in the United States.

"Accordingly, the Department does not consider it legally necessary to include provisions of the Eight Hour Law in contracts to be performed in foreign countries but feels on the other hand that such contracts are governed by local law. The Eight Hour Law was enacted for the purpose of insuring certain benefits to workmen and it does not appear that Congress intended to legislate in the interest of foreign laborers or mechanics.

"Sincerely yours,

"For the Acting Secretary of State:

"S/ Jack B. Tate

"JACK B. TATE

"*Acting Legal Adviser.*

"The Honorable

"TOM C. CLARK,

"ATTORNEY GENERAL."

APPENDIX C

"THE PANAMA CANAL

"WASHINGTON OFFICE

"Washington

"NOVEMBER 10, 1948.

"The Honorable
"The Attorney General
"Washington, D. C.

"SIR:

"Reference is made to your inquiry concerning the nationality of the 'foremen and superintendents' of unskilled alien laborers, employed in the construction of the Isthmian Canal within the Canal Zone, who were removed from the application of the eight-hour law by section 4 of the Act of June 30, 1906, 34 Stat. 669.

"This question was referred to the Governor of The Panama Canal who has advised that the foremen and superintendents referred to in the statute were United States citizens, except possibly in a very few cases.

"Sincerely yours,

"S/ B. F. Burdick
"B. F. BURDICK
"Chief of Office."

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